IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 737 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

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RAKESH JOSEPH DAMOR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 737 of 1997

MR MAHENDRA K PATEL for appellant No. 1

Mr.B.Y.Mankad, learned Addl.P.P for Respondent No. 1

CORAM : MR.JUSTICE D.K.TRIVEDI
and
MR.JUSTICE H.H.MEHTA

Date of decision: 03/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE D.K.TRIVEDI)

1. In this Appeal the appellant accused has challenged the order of conviction and sentence recorded by the learned Addl. Sessions Judge, Surat dated 10.7.97 in Sessions Case No.161/95 wherein the learned trial Judge has while accepting the case of the prosecution convicted the accused for the offence under Section 376 of I.P.C. and the accused was ordered to suffer R.I. for 10 years and fine of Rs.10,000/-- in default R.I. for 6 months.

2. During hearing, Mr. Patel, the learned advocate appearing on behalf of the appellant, while arguing the Appeal has taken us through the evidence consisting of oral and documentary as well as the judgment under challenge. It is the contention of Mr. Patel that looking to the evidence, the prosecution has failed to establish that the accused has committed any offence of rape and in support of his submission he has relied upon medical evidence on the record of the case. Further according to him as per the prosecution case, the incident has occurred on 29.4.1995 between 13.30 and 14.15 hours and considering the time taken in filing the FIR by the mother of victim, surely three is a late filing of FIR and the prosecution has not explained such delay and the same is fatal to the prosecution. He next urged that even as per the medical evidence adduced by the prosecution, it is not supported the prosecution case as there was no intercourse for which he placed reliance upon the medical certificates issued by Doctors and further as found from the evidence that when appellant Rakesh was examined no injury was found and according to him, the learned trial Judge was not right in accepting the prosecution case that the accused has committed offence of rape. Alternatively, it is his submission that after considering the evidence of the prosecution witnesses and in view of the medical evidence, at the most appellant can be held responsible under Sec.511 of the I.P.C. as there was no rape and by relying upon the provisions of Sec.511 he prayed that the sentence imposed be reduced by showing mercy on the accused looking to his age at the time of commission of the offence as he was hardly 19 years of age. He accordingly prayed that the order of conviction and sentence be set aside by acquitting the accused and alternatively the order of conviction be restored by convicting the accused for the offence under Sec.511 of the I.P.C. and the sentence imposed be substantially reduced.

3. Mr. B.Y. Mankad, learned Addl. P.P. has vehemently urged that looking to the prosecution case and as brought by the prosecution in evidence, the accused

had committed rape on a minor girl, who was hardly 7 years of age. While taking us through the evidence he demonstrated that as found from the evidence that minor Nidhi was acquainted with the family of the accused, namely, Nirmalaben and when Nidhi was hardly 6 months of age, her mother has taken the services of Nirmalaben by admitting minor Nidhi as a baby-sitter and she continued such baby sitting till the offence was committed. He accordingly submitted that the prosecution has established the case against the accused and the learned trial Judge has rightly accepted the prosecution case by convicting him for the offence of rape. It is his contention that looking to the medical evidence and the muddamal, which was seized and from the Serologist's report, it is found that the accused has committed rape on minor Nidhi and there is no case that the accused can be held responsible not for rape but for the offence under Sec.511 of the I.P.C. He has accordingly prayed for dismissal of the Appeal.

4. To appreciate the contentions raised before us by Mr. Patel and Mr. Mankad, learned A.P.P. it is necessary for us to refer to the prosecution case and as found from the record and the charge framed against the accused, it shows that on 29.4.95 between 13.30 and 14.15 hours the offence under Section 376 of the I.P.C. was committed. It is further found from the evidence that the complainant's house bearing House No.58 is close by the house of the accused and as found from the evidence of P.W.6 Miraben, who was the complainant, she has deposed that she is working with Jilla Panchayat and her husband is doing business of advertisement. She has 2 daughters,namely, Urvi and Nidhi. Elder daughter Urvi is 15 to 16 years of age while Nidhi is 9 years of age at the time when her deposition was recorded. While explaining the daily routine, she has deposed that she used to go to attend office by leaving her house at 10.30 A.M. and return at 6.30 P.M. While leaving house, she accompanies her husband and both of them are returning in the evening and her elder daughter Urvi remains in the house. Nidhi -minor daughter is admitted as a baby sitter at the house of Nirmalaben and Nidhi was admitted with Nirmala since her childhood, when she was hardly 6 months old. It is further found from the evidence that Nirmalaben is the mother of appellant accused Rakesh. While deposing about the incident, she has stated that on 29.4.95, the incident has occurred in the noon. On that day she returned at the residence at about 6.30 P.M. After she arrived at her residence, Nidhi had gone to toilet and Nidhi had complained that she is not able to pass urine while sitting and she has complained that she

has burning sensation on her private part. Accordingly she is provided soda water. On the next day Nidhi complained more trouble and accordingly she has taken Nidhi to Dr. Bhavsar where Dr.Bhavsar has examined Nidhi. On examination by Doctor, he found the private part of Nidhi was lacerated and found swelling. When they came home, she inquired from Nidhi and Nidhi had started crying. While disclosing the incident,she disclosed that on Saturday at noon she had gone to play at the house of Nirmalaben. She considered Nirmalaben as her sister in law (Masi). Rakesh had taken her to the bed in a lying condition and removed her knicker and frock and did some bad work (rape). The complaint which was filed by her was shown to her and on going through the complaint,she has admitted that the complaint, which was given by her, was the same. She has also handed over the cloth of Nidhi which were worn by her to the Police. She was shown article No.2 Paijama Frock and the knicker, which she identified that these cloths were worn by her daughter at the time of incident. She knows Rakesh, as Rakesh is the son of Nirmalaben. She also identified the accused in the court, who was wearing green lining shirt. In cross examination she was put question in respect of the residence of Jaswantbhai situated in Punamnagar, where according to her Jaswantbhai's house is situated on the open plot. She has admitted that her house and the house of Nirmalaben is situate in the same line and between two houses there is one Galla. She has also got relation with Nirmalaben. Nirmalaben had 3 sons and 2 daughters and they are Shailesh, Viki and Rakesh and Pinki and Jasika. Nirmala's husband is a rickshaw driver and at the time of incident,Rakesh was studying and as the vacation was in progress he was at his residence. At the time of incident, Nidhi was studying in First Standard and on the day of the incident, there was a vacation in the School of Nidhi. Nirmalaben has not fixed any Board on her house that she is doing business of baby-sitter.She has admitted that Nirmala is doing the job of baby-sitter and 4 to 5 boys are coming at the place of Nirmala. There was no condition that during vacation Nirmalaben has not to continue baby sitting work. During recess some time her husband used to come for some urgent work or for taking tea. There are also 80 to 90 Bungalows in Punamnagar Society and she stays in the said Society since last 15 years. She knows Maryben Fransis, who stays in Bungalow No.81. She has no knowledge whether Nirmala has any relation with Maryben Fransis. On the day of incident, there was some marriage at the house of Maryben, but she was not remembering whose marriage was there. In between the residence of complainant Miraben and the residence of Dr.Bhavsar there

was a Galla and further she has admitted that when they are required to go out of the society, they are required to pass through the society in between the house of Nirmalaben. She has denied that no such incident has occurred and further that all the family members of Nirmalaben had gone to Mumbai and she has concocted the incident. She has admitted that after the incident on the next day Nidhi had informed her about the fact of the incident and further that Nidhi has informed prior to taking Nidhi at the Dispensary of Dr. Bhavsar. However, according to her Nidhi has not disclosed the full story. She has admitted that Nidhi has, in respect of the incident, told to her twice. At the first time she has disclosed that she had a pain and she had not disclosed the full story about the incident. Nidhi had disclosed about the fact of pain between 29th and 30th of April, 1995. Nidhi has not taken dinner on that night and she got up early in the morning. Before taking Nidhi to Dr.Bhavsar, Nidhi had stated something that Rakeshbhai has done something wrong to her. However, she has not stated in detail. After taking Nidhi to Dr. Bhavsar and on the next day Nidhi had disclosed the story to her husband. Witness has also admitted that after coming from Dr. Bhavsar's Dispensary and when Nidhi had disclosed the full story about the incident, they had not gone to Dr.Bhavsar nor they called Dr. Bhavsar at her residence and admitted that after Nidhi has disclosed the full incident on the next day she has gone to Police station for filing complaint and while filing complaint, she alongwith her husband and Nidhi had gone to the Police Station. She has further admitted that Jaswantbhai was also accompanying them at the time of filing complaint. She has gone to Police Station for filing the complaint at 10 P.M. and on Monday she has attended the office and her husband has not gone to his work. In cross examination it is further found that when Nidhi had narrated the full story about the incident,at that time she alongwith her husband and Nidhi were present and Nidhi had disclosed the said story before she left for office and she returned early from the office and after consulting by her and her husband, they had gone to Police. She had denied that she had taken opinion of Jaswantbhai. After giving the complaint, she has not gone to the Police again and second time her statement was not recorded by Police. She has admitted that there are 2 to 3 boys coming as baby-sitter. However, she is not in a position to disclose the name of their guardians. One of the boy was named as Dipu. She has not disclosed in the complaint about what Nidhi had disclosed while narrating the preliminary talk. After giving F.I.R., the police came on the next day and she

has not given any statement. The police has recorded statement of Nidhi on the very day when she had filed complaint. She had denied the suggestion that no such incident has occurred and Nirmalaben's house was closed. She has further denied that because of the intervention of the neighbour, she has filed the complaint. As found from the cross-examination, she has stated that Nidhi had given complete history about the incident to her as well as to her husband and prior to the filing of the complaint she has disclosed the same to her neighbour, who was residing there prior to 3 to 4 month and she does not know the name of that neighbour nor she remember the name of the family member of the said neighbour. She has admitted that she had disclosed the fact about the incident to Jaswantbhai. Some suggestion is put in respect of the situation of the house of Jaswantbhai. As found Jaswantbhai's house was in an open plot and the witness has admitted that during vacation the boys are playing cricket.Witness has denied that as Rakesh was playing much cricket and was taking much interest in cricket, for which Jaswantbhai had a grievance for which complaint is filed.As found from her cross-examination that after disclosing the story by Nidhi,she has not stated to Urvi and Nidhi has disclosed about the incident to her and not by Urvi. She has also admitted that on Saturday she has not inquired from Urvi. However,she has inquired that on the date of incident where Urvi had gone and what was doing. Urvi had replied that she was at her residence and was watching the picture and at that time Nidhi came weeping by naming Rakesh and after changing cloth she slept and Urvi could not understand such talk.

5. From the evidence of complainant Miraben it transpires that she and her husband were leaving the house together at 10.30 A.M. and were returning home at 6.30 P.M. It is further found that Nidhi was attached with Nirmalaben as a baby sitter when she was hardly 6 months old. In respect of the incident dated 29.4.95,it is only when she came from the office in the evening Nidhi has complaint of pain at the private part and she has provided soda water and on the next day Nidhi was taken to Dr. Bhavsar where Dr. Bhavsar has examined Nidhi. In the cross- examination it is found that Nidhi has disclosed full story about the incident to her father when she was also present. The house of accused and the house of complainant are on the same line in the same society. Defence of the accused is that the house of Nirmalaben was closed as all the members had gone to Mumbai to attend the marriage in the family of Maryben, who is also residing in Bungalow No.81 in the same Society. When she came to know about the fact of

incident narrated by minor Nidhi, who is hardly 7 years, her husband had decided to file complaint before Police and accordingly on Monday at 10 P.M. a complaint was filed before police and further that statement of Nidhi and others were also recorded by the police on the same day. As per the prosecution case a complaint was filed by Miraben,mother of victim Nidhi, on 1.5.95 in respect of the incident which has occurred on 29.4.95. As found from the evidence of P.W.6 Miraben, victim minor Nidhi has complained on 29.4.95 that she was not in a position to pass urine and she has some pain on her private part. In normal course she has provided soda water to her and the next day when Nidhi had made complaint for her pain in her private part,she was taken to Dr. Bhavsar,whose dispensary and the house is situate in the same society and as per the examination by Dr. Bhavsar, Dr. Bhavsar has in term found that on private part of Nidhi there was external lacerated swelling and after she returned from Dr. Bhavsar's Dispensary, Nidhi was further inquired and she has narrated the full incident which had occurred on the previous day at the house of accused Rakesh. A complaint was filed on Monday i.e. on 1.5.95 after she discussed with her husband.

6. At this juncture, we refer to the evidence of P.W.11 Bhikhubhai. He deposed before the court that on 1.5.95 he was attached to Umra Police station and on that day at 22.30 hours the complainant Miraben had come and she disclosed the incident, which was recorded by his Writer and after recording the F.I.R., the same was sent at the Police Station for registering the offence. On seeing the F.I.R. mark 'A' he deposed that the said complaint is of Miraben and the same was recorded as per the say of Miraben and she has put her signature before him. The complaint Mark 'A' was given Exh.24. In the cross examination he has deposed that alongwith Miraben her minor daughter Nidhi and her husband Dilipbhai had come to the Police Station and he issued the yadi in favour of the Medical Officer referring the minor Nidhi. He has not recorded the statement of Dilipbhai or minor Nidhi. He denied the suggestion that no such complaint was given by Miraben. F.I.R. Exh.24 given by Miraben disclosed about the incident which has occurred on 29.4.95 and as per the F.I.R. Rakesh who is residing in the same society had committed rape on minor Nidhi between 15 to 16 hours while she has gone to play at the house of the accused. In view of the evidence of P.W.11 Bhikhubhai, the complainant Miraben had gone to the Police station at 22.30 hours on 1.5.95 and the complaint of Miraben was recorded by the Writer of Umra Police Station in respect of the incident of rape committed by

the appellant accused.

7. At this juncture it is equally necessary to consider the evidence of minor victim Nidhi. Minor Nidhi aged 9 years- P.W.7 had deposed before the court.As found from her evidence that before proceeding with recording of the evidence, the court has tried to inquire whether the witness is in a position to understand the question and the court has put several questions including her name,mother's name, where she studies,where she is residing, the name of the river in Surat, about the direction and as found from her reply, minor Nidhi, aged 9 years, had given intelligent answers and the learned trail Judge has after considering that her answers are satisfactory, she was permitted to give evidence. On going through her evidence,her evidence is natural. As found from her evidence she has deposed that she stayed with her parents and elder sister. Her mother is serving while her father is doing business of advertisement and her parents are leaving house at 10.30 in the morning and they return in the evening at 6.30. While referring to the incident, according to her on 29.4.95 in the noon she alongwith her elder sister were in the house. She has gone to Nirmalaben's house for playing.When she has gone to the house of Nirmalaben at that time Dipu and Rakesh were there. She identified Rakeshbhai, who was found in the court. Dipu was a small boy, who was at the relevant time in the cradle. Rakeshbhai took Dipu in back room and thereafter Rakeshbhai had closed the front door and she slept on a bed. Thereafter, Rakeshbhai had increased the volume of T.V. and removed her cloth and thereafter removed her Paijama and thereafter accused has also removed his cloth and accused slept over her and he has done some work 'RAKESHBHAI GANDHU GANDHU KARELU'. She refused. Further in the private part of Rakeshbhai she found pus. Thereafter, Rakeshbhai had worn his cloth which were removed by him and she has also worn cloth and gone to her house by weeping.She has changed the cloth and slept. In the evening her parents came at the house and she has complained that she has some pain on her private part and her mother has given soda water. On the next day she was taken to Dr.Bhavsar's Dispensary where Dr. Bhavsar has examined her and her statement was recorded by the Police. While showing the muddamal article No.2 Paijama and frock, she deposed that the same are belonging to her. However, while seeing the knicker she has not identified the same as of her. In the cross examination she has deposed that at the relevant time she was studying in First standard and her examination was over. She used to go to School at 12 noon and return at 5.30 P.M. She goes to School in rickshaw while Urvi is

going on a cycle. The school time of Urvi is also the same and she is also studying in the same School and Urvi is at present studying in 7th Standard. At the time when she has gone to the house of Nirmalaben for playing, Dipu was also playing with her. She played with Dipu for 5 to 10 minutes. She has denied that at the time when she went to the house of Nirmalaben, Nirmalaben was present. The house of Nirmalaben consist of one room and kitchen and in the front of the house there is one Otla. She and Dipu were playing in on Otla. Dipu is younger to her. Dipu was not staying in Punamnagar Society. She used to go to play with Dipu every day even prior to the incident. At what time Dipu came, she has no idea and further Dipu was brought by his mother. At the time when Mummy had given soda water she had not talked with her and denied that she had gone to play after taking soda water. She has not got up on that night for dinner though her mummy has awakened her. She has not disclosed to Dr. Bhavsar about the incident. Dr. Bahvsar has given some medicine. Thereafter she played for some time. After returning from Dr. Bhavsar's place, mummy had made inquiry for which she was crying and she had gone inside the room. She has disclosed about the incident first to her mummy and the day on which she had disclosed to her mummy on that day they had gone to Police Station. She alongwith her parents and one uncle had gone to the police station where the police has recorded her statement. Her further statement was also recorded by the police after two-three days.She used to go to house of Nirmalaben in the morning and noon for playing and when nobody is found in the house she used to go for the whole day. Even when Urvi was present in her house she used to go to Nirmalaben's place. She denied that Urvi also had accompanied her at the house of Nirmalaben. She had denied that she alongwith Dipu had not gone inside the room and they were playing in the Otla and as they were playing in Otla,Rakeshbhai had taken both inside the house. When Rakeshbhai took Dipu inside the room at that time Dipu was playing with her. She has denied the suggestion that while playing she has fallen down and due to fall she was crying and gone to her house. She has denied the suggestion that at that time Nirmalaben was also at the house.She has denied that no such incident has occurred. It is further found from the cross examination that after going to Dr. Bhavsar on the next day they gone to Police Station.

8. As found from the evidence of minor Nidhi she has deposed before the court what transpired on her on the day of the incident. As found from her deposition, her deposition is very natural. She has deposed that she had

gone to the house of Nirmalaben. At that time a small boy Dipu and accused Rakesh were present. On the day when the incident has occurred, she was hardly 7 years of age and as per her evidence,when she alongwith her mother and father had gone to the Police Station, Police has recorded her statement. As found from the cross examination, there is nothing to suggest that Nidhi had stated something else before the Police than what she had deposed before the court. Not a single contradiction is brought in the cross - examination. Nidhi was accustomed to visit Nirmalaben's house from the initial stage when she was hardly 6 months old and further that Nirmalaben's house is situated on the same line where she resided. A suggestion is put to her that at the time when she had gone to the house of Nirmalaben, Nirmalaben was present. However, witness has denied the same and according to her at the time when she had gone to the house of Nirmalaben, a minor boy Dipu and Rakesh were there alone. Nidhi identified Rakesh as Rakeshbhai. She has disclosed in her deposition what transpired on her on 29.4.95 wherein she has in term in natural course deposed that after accused took Dipu in the another room,the accused has taken victim Nidhi in a cot and further the accused had gone to close the door and tried to increase the voice of T.V. and further accused has removed her cloth as well as his cloth and acted in the fashion she disclosed. She has disclosed that after that, from the private part of Rakeshbhai pus was oozing. The witness was not contradicted in respect of the incident and on close scrutiny of the evidence of minor Nidhi, it gives confidence that she has deposed what transpired on her on the day of incident at the instance of the accused.

9. Now referring to the evidence of P.W.3 Dr. Bhavsar, he has deposed that he runs the Dispensary in the same house where he resides situated in Punamnagar Society, Surat. He is having Degree of M.B.Bs. On 30.4.95 he examined Nidhi and on examination he found that on private part of Nidhi there was a lacerated wound and inflammation and on her private part she has a pain. He issued Certificate on 2.5.95 on his letter head. Exh.11 Medical Certificate dated 2.5.95 reads as under:-

" This is to certify that I have examined Nidhi Suthar on 30.4.95. The external OS (Private part) was lacerated and inflamed. It was tender."

In the cross examination, he admitted that his clinic and the residence is common and further Dilipbhai and Miraben are also residing in the same Society and,

therefore, he knows them and admitted that when any family member had become ill, they used to come to take medicine. On Sunday he opened the Dispensary only in the morning. He has further admitted that the lacerated part was also possible if it is done by itching and admitted that if lacerated wound is found, then there would be a swelling. He had started Dispensary in the year 1990 and at the time of examining the patient, he was not sure whether it was a medico legal case. However, he says that he had advised to show to the Specialist. The first in point of time Dr. Bhavsar has examined minor Nidhi. He found that Nidhi had a lacerated wound and inflammation on her private part and she has a complaint. Dr. Bhavsar has proved Medical Certificate, which is at Exh.11.

10. Dr. Shukla- P.W.2 has deposed that on 2.5.95 he was on duty at New Civil Hospital and on that day at 12.45 P.M. a patient,named, Nidhi aged 7 years was brought under police yadi. At the relevant time the witness was working in the said Hospital in Gynecology Department as an Assistant Professor. Before examining Nidhi, the guardian of Nidhi has given history of rape on her. Dr. Shukla had examined Nidhi and on examination of Nidhi there was no mark of injury and on the private part of Nidhi there was swelling. No injury was found and her hymen was intact and no semen was found. Near future no intercourse has taken place. Doctor has issued Certificate, which is at Exh.9. Doctor has deposed that duration of injury must be about 48 to 72 hours and such injury is also possible by substance or if an aged person has tried to do intercourse on her and attempted to commit rape on her such injury is possible. In cross-examination this Doctor has deposed that if any infection is found on the private part, then itching is possible. Doctor has admitted that the history was narrated by the parents of Nidhi. Exh.9 is the Medical Certificate issued by Dr. Bhama Rajan dated 5.5.95. As per the medical certificate Doctor has found hymen intact. As found from the evidence of Dr.Shukla- P.W.2, Nidhi was brought under Police Yadi before him on 2.5.95 and history was furnished by the parents of Nidhi, which has occurred on 29.4.95. As per his evidence, the injury fund on Nidhi was old i.e. 48 to 72 hours old. Thus there is medical evidence in respect of the examination by both Dr. Bhavsar and Dr. Shukla on Nidhi on 30.5.95 and 2.5.95 respectively.

11. As per the evidence of P.W.12 Ambaram he deposed that on 2.5.95 he received papers of investigation in C.R.No.268/95 for the offence under Section 376 IPC and

he has drawn the panchanama of scene of offence in presence of Panchas. Thereafter, he has seized the cloth of Nidhi produced by her mother Miraben in presence of Panchas on the very day between 10 to 10.45 hours and the very day he effected arrest of the accused between 14 to 14.45 hours and as the accused has willingly produced the cloth, which he worn, they were seized in presence of panchas. After arrest of accused under Police Yadi the accused was sent to Hospital for examination and after getting the necessary Certificate in respect of Nidhi and the accused and after getting F.S.L. Report (Serologist's report), charge-sheet was filed against the accused. Witness has also identified the accused and the muddamal in the court. In the cross-examination he deposed that he went to the scene of offence at 8 A.M. and he also recorded further statement of complainant Miraben. Witness has recorded statement of Urvi,Dr. Bhavsar, Dilipbhai, Nidhiben, Nirmalaben and Maryben Fransis on 2.5.95. He has admitted that prior to drawing panchanama Exh.20 he has arrested the accused and no separate Panchanama of arrest of accused was made. He denied the suggestion that he has recorded statement of witness by his own and in a prepared panchanama he took signature of the Panchas and further that a police case has been filed against the accused.

12. We are not discussing in detail in respect of the evidence regarding cloth of Nidhi and the accused produced under Panchanama. However, as found from the evidence of prosecution witness No.4 Manishbhai Patel, who acted as a Panch, he has deposed that he was called as a panch by the police on 2.5.95 at 8 A.M. at bungalow No.56 situated in Punamnagar Bhatar Road. Other Panch was also present. The place of incident was shown by Nidhi and during that time bed sheet was seized by the police. There were furniture in the room. T.V. was there. In the bed sheet there were some stains. The said bed sheet is Article No.1 and the witness has also identified the said bed sheet. On seeing Article No.1 he has deposed that it is the same article which was seized by the police under panchanama. He has proved the Panchanama Exh.13. In the cross - examination nothing was brought by the defence, which effect the prosecution case and the witness has in term denied the suggestion that nothing was seized by the police in his presence. Article 1 bed sheet was seized under Panchanama, which was send by the investigating agency for chemical examination before F.S.L. The report of the F.S.L. is also on the record at Exh.26. As per the letter issued by the F.S.L. to the Police Inspector, Umra Police Station, a bed sheet was found in parcel "A' and it is

Article No.1. The description of the said article shows that it was brown gray cotton bed sheet and the said article is having light yellowish stiff with stain. On examination of the said article No.1 bed sheet, it is found that there was presence of human semen, though no blood was found. So far as the cloth of the accused are concerned, admittedly as found from the panchanama that at the time when the accused had produced his cloth, prior thereto the cloths were washed. As observed earlier, the scene of offence was shown by victim minor Nidhi and the police has seized the bed sheet in presence of panchas and as per the serologist's report, on the said article a human semen was found. This is a strong piece of evidence to connect the accused in commission of the offence.

13. According to Mr.Patel there is delay in filing F.I.R. and the prosecution has failed to explain such delay. It is the contention of Mr. Patel that the incident in question has occurred on 29.4.95 and the complaint is filed by the mother of victim after two days i.e. on 1.5.95 late at night at 10 '0' clock. As discussed earlier, the incident in question has occurred on 29.5.95 at the house of the accused between 13.30 to 14.15 hours and admittedly as found from the evidence, neither the complainant nor her husband were present in their house. Another daughter of complainant, namely, Urvi, who was also a minor girl, hardly 12 years of age was present. The prosecution has also examined Urvi who in term has deposed that on 29.4.95 in the noon she alongwith Nidhi were in their house and Nidhi had gone to the house of Nirmalaben and after some time, Nidhi came by weeping and when she inquired from Nidhi, Nidhi had by weeping narrated the name of Rakeshbhai and, thereafter, Nidhi had gone to bed. When their parents came in the evening, Nidhi has disclosed that she had a pain on her private part and on the next day morning complainant has taken her to Dr. Bhavsar. P.W.8 had also identified the accused Rakesh in the court. She has further deposed that the police has recorded her statement. As found from the cross examination, she has stated that at the relevant time, she was studying in Standard VII and her examination was over and the vacation was in progress. Their house and the house of the accused is situated after leaving one house and Dr. Bhavsar is also staying in the same line where he is also conducting the Dispensary. She has admitted that on the day of the incident her father has come at the house between 2.15 and 2.30 for tea and he stayed for about half an our and thereafter her father has come in the evening with her mother. Nidhi had not informed about she is having pain

and when Nidhi had informed this fact to her parents, she was not present. She has further deposed in cross examination that when her father came in the noon she has told that Nidhi was weeping. She has further deposed that when Nidhi had complained about pain, Dr. Bhavsar was not called and when Nidhi was taken on the next day to Dr. Bhavsar she was not accompanying. She has denied the suggestion that on the day of the incident the entire family members of Nirmalaben had gone for marriage at Mumbai and she has denied that she has made wrong statement before the police as well as she is also deposing falsely. So far as the delay part is concerned Mr. Patel has placed reliance upon the decision of this court in the matter of State of Gujarat v/s Mahmad Munno Usmanbhai Chauhan,reported in 1996(2) GLR 821. While relying upon the said decision, according to Mr. Patel in the present case the complaint is filed after 2 days and in view of the ratio in the said case, the High Court has while considering the acquittal appeal filed by the State has in term held that in view of the fact that delay is not explained as observed in paragraph 5 and 6 of the said decision, the Division Bench has dismissed the acquittal Appeal filed by the State. In the present case, the said decision is not applicable, considering the fact of the said case as well as the facts reported in the present case. In the present case victim Nidhi is hardly 7 years of age and Nidhi is accustomed to visit the house of Nirmalaben as she was admitted as a baby sitter since her childhood, namely, from 6 months of age. Nidhi had explained the way in which Rakeshbhai has behaved on that day when the accused has committed rape on her. When Nidhi has returned to her house her elder sister hardly about 11 years was at home and Nidhi had narrated by weeping by naming Rakeshbhai. No elder member of the family was present and in the evening when the complainant Miraben came,Nidhi had complained that she is having a pain on her private part. Considering the age of Nidhi and considering the complaint made by her to her mother in normal course mother has provided soda water and when such pain continued, on the next day Miraben had taken Nidhi to Dr. Bhavsar and it is thereafter when inquiry was made Nidhi had disclosed to her mother and subsequently detailed story was disclosed by her to her father when complainant Miraben was also present. That was on Sunday and as found from the evidence that after consultation by complainant Miraben and her husband Dilipbhai, they returned early from the office and decided to file complaint and accordingly the complaint was filed before the Police on 1.5.95 at 10 P.M. Even no suggestion was made by the defence in respect of such delay in filing the complaint and in the

evidence of complainant Miraben she has deposed before the court the manner in which Nidhi was taken to Dr. Bhavsar and thereafter after getting the entire history about the incident from minor Nidhi on the next day, namely, on Sunday, complaint was lodged immediately on the next day at night. As found from the evidence of complainant Miraben that they have also discussed in respect of filing complaint by each other, namely, Miraben and her husband Dilipbhai and a neighbour and ultimately they have decided to file the complaint. In our view, looking to the facts of the present case, as highlighted from the evidence of prosecution witnesses, namely, complainant and victim Nidhi, such delay is not fatal to the prosecution and the ratio in the case of State of Gujarat v/s Mahmad @ Munno Usmanbhai Chauhan (Supra) is not applicable to the present case.

14. So far as medical evidence is concerned, Mr. Patel has contended that as the hymen was intact, one can not say that it is a case of rape. As observed earlier, as found from the deposition of Dr. Bhavsar P.W.3 and the medical certificate Exh.11, when Nidhi was examined by Doctor on 30.4.95 the external private part was found lacerated and inflamed. The Doctor has in term recorded that there was a pain on her private part and swelling on the private part, which was lacerated and further when she was examined by Dr. Shukla P.W.2 on 2.5.95, the Doctor has also found the injury, which we have already referred to earlier and as per the medical certificate the hymen was intact. At this juncture it is also necessary for us to refer to the evidence of Rameshchandra - P.W.1, who deposed that on 2.5.95 he was on duty as a Medical Officer at Civil Hospital and accused Rakesh, aged about 17 years, was brought before him under a Police Yadi at 3.10 P.M. and he examined accused Rakesh. While giving description of the identical marks found on the body, he has recorded that there was no injury on the private part of the patient and he has proved the medical certificate issued by him, which is at Exh.7 on the record. As per the evidence and the medical certificate there was no injury on the private part of accused Rakesh. However, it is to be seen that accused Rakesh was examined by Doctor on 2.5.95 in the noon wherein as per the prosecution case, the incident in question had occurred on 29.4.95. As observed earlier in the deposition of victim Nidhi P.W.7 she has while explaining the incident narrated the manner in which the accused has acted on her when she has gone at the house of Nirmalaben, namely, the house of the accused and she has deposed that inspite of telling no, she found from the private part of accused Rakeshbhai

there was oozing of pus. In the serologist's report on article 2 frock there was a presence of human semen and further in bed sheet article 1, which was recovered from the house of accused under Panchanama, also a human semen was found. In our view, as found from the evidence of complainant Miraben and the victim Nidhi, the prosecution has established the guilt against the accused and the learned trial Judge has rightly recorded the conviction of the accused for the offence under Sec.376 of the I.P.C.

15. Next contention of Mr. Patel is that at the most in view of the evidence the accused can be held only responsible for the offence under Section 511 of the I.P.C. and if the accused has committed any offence under Sec.511 of the I.P.C. the sentence imposed on the accused deserves to be reduced and he further states that the accused is in Jail for more than 5 years. As observed earlier, while discussing the prosecution evidence as well as the documentary evidence, it is difficult for this court to accept the submission of Mr.Patel that the offence which the accused has committed is under Sec.511 of the I.P.C. However, the prosecution has established that the offence which the accused has committed is for offence of rape, namely, under Sec.376 of the I.P.C. and, therefore, it is difficult for us to accept the submission of Mr. Patel.

16. It is also the contention of Mr.Patel that the sentence imposed on the appellant accused be reduced as according to him at the relevant time the accused was hardly 17 years of age and as found from the medical evidence that Nidhi was attending the house of accused as the mother of the accused was a baby sitter when Nidhi was hardly six months old and there is no evidence that the appellant accused has misbehaved or acted in this fashion and further that the accused has remained in Jail for more than five years and according to Mr.Patel the sentence imposed on the appellant accused be reduced by passing order of sentence undergone.

17. Considering the submission of Mr. Patel on the point of reduction of sentence, we are not impressed with such submission and the reason is that a serious offence is committed by the appellant accused on a minor girl, who is hardly 7 years of age and as found from the evidence that Nidhi used to attend the house of the accused, because mother of accused was a baby sitter when she was hardly six months old and as found from the evidence that when the accused has committed such serious offence,no one was found in the house except a young boy

named Dipu and the accused Rakesh had also taken that boy in the other room and, thereafter,rape was committed on victim Nidhi. No other family members of the accused were present. In our view, this is not a case for reduction of sentence as contended by Mr.Patel. Even the learned trial Judge has while imposing sentence ordered to suffer only R.I. for 7 years and it is difficult for us to reduce the sentence imposed by the learned trial Judge. In our view, the minimum sentence is imposed by the learned trial Judge as provided. No other points were canvassed and accordingly there is no substance in the present Appeal and the same deserves to be dismissed.

18. Accordingly the Appeal is dismissed. The order of conviction and sentence recorded by the learned Addl.Sessions Judge,Surat in Sessions Case No.161/95 on 10.7.97 convicting the accused for the offence under Sec.376 of I.P.C. and sentencing him to suffer R.I. for 10 years and to pay a fine of Rs.10,000/-- in default R.I. for 6 months is confirmed.

(D.K.Trivedi,J)

(H.H.Mehta,J)

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